J. S. Troup Electric, Inc. *and* Avi Israel. Case 3–CA–24587

June 30, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On November 3, 2004, Administrative Law Judge William C. Kocol issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

The judge found that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging Avi Israel for his union activities. In reaching that conclusion, the judge relied in part on Israel's testimony, which he broadly credited. The Respondent has not specifically excepted to the judge's unlawful discharge finding. It has excepted, however, to the judge's exclusion of evidence purportedly showing that Israel was working while receiving unemployment or worker's compensation benefits, allegedly in violation of State law, and that he was untruthful with the relevant State agencies concerning those matters. The Respondent contends that, under Federal Rules of Evidence, 608(b), the judge should have admitted the proffered evidence, because it would have undermined Israel's credibility. For the reasons discussed below, we find that the judge did not abuse his discretion in excluding this evidence.

Facts

At the hearing, the judge deferred ruling on the admissibility of the proffered evidence until after the parties rested their cases-in-chief, so that he could better determine "whether this evidence really is of the type that would impugn the general credibility of the witness." Then, after listening to arguments on the issue, the judge allowed the Respondent to make a detailed offer of proof. In making the offer, Respondent's counsel stated that he intended not only to cross-examine Israel, but also to examine several other witnesses (Israel's wife, an architect who allegedly worked with Israel after he was discharged, and the vice president of a company that allegedly hired Israel after his discharge) and introduce a number of documents, all concerning Israel's alleged employment while receiving unemployment and/or worker's compensation. The judge rejected the offer and excluded the evidence.

Discussion

Under Section 10(b) of the Act and Section 102.39 of the Board's Rules and Regulations, the Federal Rules of Evidence apply insofar as practicable to unfair labor proceedings under the Act. *George Joseph Orchard Siding, Inc.*, 325 NLRB 252, 254 (1998), enfd. *NLRB v. George Joseph Orchard Siding, Inc.*, 123 Fed. Appx. 746 (9th Cir. 2004) (No. 03-71401) (unpublished). Federal Rules of Evidence, 608(b) provides, in relevant part, that

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness . . . .

Two things are apparent from the plain text of the rule. First, extrinsic evidence bearing on a witness's credibility is inadmissible unless it pertains to a criminal conviction. Second, cross-examination of the witness on specific bad acts which are relevant to the witness' credibility is left to the judge's sound discretion. See, e.g., *U.S. v. Martz*, 964 F.2d 787, 789 (8th Cir.), cert. denied 506 U.S. 1038 (1992). While the Advisory Committee Note cautions that "[e]ffective cross-examination demands that some allowance be made for going into matters of this kind" and Board law is not inconsistent, see footnote 4, infra, the judge may

[1] The General Counsel has moved to strike Exhibit A to the Respondent's brief in support of exceptions (consisting of the Respondent's posthearing memorandum to the judge). The General Counsel contends that the exhibit contains matters outside the scope of the Respondent's exceptions, and therefore does not conform to Board Rules and Regulations Sec. 102.46(c). Sec. 102.46(c) provides, in relevant part, that "Any brief in support of exceptions shall contain no matter not included within the scope of the exceptions[.]" We read the Respondent's exceptions as at least implicitly excepting to the judge's credibility findings, and as the Respondent's posthearing brief to the judge addresses credibility, we shall deny the General Counsel's motion and accept the Exhibit for factual background.

[2] The Respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. See also discussion in text below.

exclude such evidence "if its probative value is substantially outweighed by . . . considerations of undue delay [or] waste of time [.]" *U.S. v. Atwell*, 766 F.2d 416, 420 (10th Cir.), cert. denied 474 U.S. 921 (1985) (Rule 608(b) is subject to Rule 403.) After such a cross-examination, however, the cross-examiner may not attempt to disprove the witness's answers by extrinsic evidence. *U.S. v. Martz*, supra, 964 F.2d at 789. The purpose for barring extrinsic evidence is to avoid holding mini-trials on peripherally related matters. *Carter v. Hewitt*, 617 F.2d 961, 971 (3d Cir. 1980). Applying these principles, we find that the judge did not abuse his discretion under Rule 608(b) in excluding the Respondent's proffered evidence.

First, Respondent's counsel made an elaborate and detailed proffer concerning whether Israel was truthful with the New York unemployment and worker's compensation agencies. While the proffer included examining Israel on this issue, most of the proffered evidence consisted of documents and the testimony of witnesses other than Israel (i.e., extrinsic evidence). Because this evidence did not involve a criminal conviction, it was inadmissible under Rule 608(b).[3]

Second, the judge did not act summarily. The judge deferred ruling on counsel for the General Counsel's objection to cross-examination into Israel's alleged interim employment until he had heard all the evidence bearing on Israel's credibility. Compare *Enterprise Industrial Piping Co*., 117 NLRB 995, 995 fn. 2 (1957), enfd. *J. J. White, Inc. v. NLRB*, 252 F.2d 807 (3d Cir. 1958) (on the record presented the Board found trial examiner did not abuse discretion in refusing to permit cross-examination concerning employees' false statements on unemployment insurance claim) with *Vanguard Oil & Service*, 231 NLRB 146, 151 (1977) (Board remanded the case to the administrative law judge to take evidence regarding the discriminatee's failure to report interim employment to the state unemployment compensation authorities "and for reconsideration of Hester's credibility in light thereof.") As a result, each of the factors that the judge relied on in crediting Israel's testimony—his demeanor as a witness, the internal consistency of his testimony, the corroboration of his testimony by other witnesses, and the pretextual nature of the testimony of certain of the Respondent's witnesses -- would have been apparent at the time the judge heard Respondent's proffer and denied introduction of the proffered evidence. Thus, the judge was in a position to decide, as he put it, "whether [the proffered] evidence, most of which as noted was impermissible under Rule 608 really is of the type that would impugn the general credibility of the witness." Given the judge's comment, it is reasonable to infer that the judge would have credited Israel even if evidence that he had been less than honest on his unemployment or workers' compensation forms had been introduced.[4]

In sum, for the reasons set forth above, we find the judge did not abuse his discretion in disallowing introduction of the evidence Respondent proffered.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, J.S. Troup Electric, Inc., Blasdell, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. June 30, 2005

Robert J. Battista , Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Ron Scott, Esq., for the General Counsel.
Andrew P. Fleming, Esq. (Chiacchia & Fleming, LLP), of Hamburg, New York, for the Respondent.
Richard D. Furlong, Esq., (Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria LLP), of Buffalo, New York, for the Charging Party.

[3] By excluding the evidence, moreover, the judge avoided holding a mini-trial on at best peripherally related matters, such as New York unemployment compensation and worker's compensation law.

[4] In other Board cases, misrepresentations similar to those at issue here have been acknowledged as relevant, though not necessarily determinative, in assessing the credibility of a witness. See, e.g., *Vanguard Oil & Service*, 231 NLRB 146, 151 (1977); *Birmingham Publishing Co.*, 118 NLRB 1380, 1384-1385 (1957), enfd. 262 F.2d 2 (5th Cir. 1958); *Harvey Aluminum*, 142 NLRB 1041, 1057 (1963); and *Liberty Scrap Materials, Inc*., 152 NLRB 480, 484 (1965).

In light of that fact, and the Advisory Committee Note's recognition that "[e]ffective cross-examination demands that some allowance be made for going into matters of this kind," Member Schaumber believes that it would have been preferable for the judge to have disregarded the elaborate proffer made by Respondent's counsel, but nevertheless permitted at least some cross-examination of Israel with respect to his alleged misrepresentations to state authorities in connection with unemployment and/or worker's compensation benefits.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was heard in Buffalo, New York on August 11-12, 2004. The charge was filed by Avi Israel, an individual, on December 5, 2003.[1] The complaint issued on January 30, 2004 and alleges that J.S. Troup Electric, Inc., (Respondent) violated Section 8(a)(3) and (1) of the Act by discharging Israel on November 4. Respondent filed a timely answer that denied that it had violated the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party, and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, with a place of business in Blasdell, New York, located near Buffalo, New York, (Respondent's facility), has been engaged as an electrical contractor in the construction industry doing commercial electrical work. During the 12-month period ending December 31, 2003, Respondent has provided services valued in excess of $50,000 to enterprises located within the State of New York that are directly engaged in interstate commerce. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the International Brotherhood of Electrical Workers, Local 41 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Respondent operates as a nonunion electrical shop. John Troup is Respondent's president and David Hatten is vice president. Troup moved to Florida in 2002 and Hatten was in charge of the day-to-day operations at the facility. The number of employees working for Respondent ranged from 5–6 to 10–15.

Israel began working for Respondent in June 1996 as an electrician. He was making $28 per hour when his employment ended; this was about twice the rate that Respondent paid to other employees. Respondent provided Israel with a van and cell phone. Hatten stated, "Israel had been our top guy at the company." He also stated "Israel was trusted with taking care of things in the field, especially if I was absent, meaning Israel would make sure that the jobs were getting done."

Charles Moore is an organizer for the Union. Over the years Moore attempted to recruit Israel to become a union member but his efforts were unsuccessful. The Union did successfully persuade about five other employees to leave Respondent employment to work elsewhere and join the Union. In the late summer in 2000 an apprentice working with Israel left Respondent to become a union electrician. Shortly thereafter Hatten told Israel that Troup wanted to know if he also was going to leave Respondent and join the Union. Israel said he did not intend to leave, but that he did want to talk with Troup concerning his benefits. Israel then met with Troup. Troup asked Israel if the Union had approached him and Israel said that it had and that the union pay and benefits were very attractive to him. Israel said he did not intend to leave Respondent but he wanted his wages to be raised to the union pay rate and also wanted better medical insurance. Troup agreed to bring Israel up to the union pay scale over a 2-year period and he also agreed to provide Israel with better medical insurance. Troup told Israel that he would get these improvements as long as he did not bring up the subject of the Union. They discussed whether another employee was also going to join the Union and then Troup said the next time he heard anything about a union from any worker the employee would be fired. In June 2002, Israel received a $2-per-hour wage increase to $28 per hour; that matched the increase and hourly rate received by union employees in the area. Apparently under the union contract another $2-per-hour increase was due in June 2004 and sometime in about October Israel reminded Hatten that he had not received an increase in about 2 years and that he was due for one in June 2004. From time to time Israel received literature from the Union and he sometimes showed that information to Hatten.

In 2002 Respondent had an arrangement with Israel whereby Israel could use the cell phone and cell phone service provided by Respondent for his personal use at the cost of $50 per month. Respondent regarded this as a benefit that it provided to Israel. In January 2003 that arrangement ended when Israel began paying for his personal usage of the cell phone. However, thereafter Israel again began using the company cell phone line for personal calls. In September Troup called Israel and complained about the calls that were being made in the evening and on weekends using the company cell phone service and Israel agreed to start paying the $50 per month again, which he did for September and October. Apparently in another call sometime in September, Troup called Israel from Florida concerning Israel's cell phone usage. Troup complained how expensive Israel's cell phone usage had become. Israel explained that Hatten had been in and out of work because Hatten had been ill and as a result Israel had been running three projects plus he had been taking numerous calls from contractors, vendors, and employees. Israel claimed to be "running the company" during that time period and he was using the cell phone to return many calls that were made to him. Troup asked Israel to identify which calls were business calls and Troup would pay Israel for them. During the same time period Hatten asked Israel to review bills for his cell phone usage since the beginning of the year but Israel refused to do so. Hatten agreed with Israel, telling Israel that he felt that the request for Israel to review the bills was ridiculous.

Originally Respondent had paid for the entire cost of Israel's dental insurance but in late 2002 Respondent had stopped paying for it and Israel had to do so. At that time Hatten explained to Israel that dental insurance coverage was optional for employees. In early October Israel noticed the amount he paid for dental insurance from his paycheck had increased. Israel raised the matter with employee Nick Germanovich at work; Germanovich said that he did not think he had dental insurance.

[1] All dates are in 2003 unless otherwise indicated.

But Germanovich began complaining about a lack of hours and asked Israel if he knew if there were other jobs that they would be working on for Respondent; Germanovich expressed concern about whether he was going to work over the winter. Israel asked if Germanovich would ever consider joining a union and Germanovich answered that he would. Israel also talked to employees Ron Serrano and Sam Speciale who also expressed an interest in joining a union. In mid or late October Israel called Moore and told him that some workers on the job wanted to set up a meeting with the Union. Moore answered that he would find a location for the meeting. At that time Israel was working mainly on the Voss Dental project; he was also finishing several other projects.

Also in mid-October Moore called Respondent's office and spoke to an estimator. Later that day Troup called Moore and said that Moore was a "lousy piece of shit" and said that if Moore ever called the office again or talks to any of his people anytime or any place he would come looking for Moore.[2]

On Friday, October 31 Israel took a coffee break with the aforementioned employees and also employee Dicky Myers. Israel asked them to come into a small room. Israel informed them that he had spoken with Moore. The employees expressed their support for the notion of meeting with the Union and they said that they were concerned about whether there was enough work for them during the upcoming winter.[3] Israel told the employees that he hoped that they could join the Union as a group and thereby remain working for Respondent instead of quitting and working for a union represented employer. He explained how this had happened at an employer he had worked for in the past.

Over that weekend Israel contacted employee Rusty Browning. Israel informed Browning about the developments concerning the Union and Browning indicated that he supported that effort. Browning said that he had not worked a full week the previous week and was concerned about his job.

On Monday, November 3 Israel again met with the employees at the job during coffee break. Israel told the employees that there was strength in numbers and that they had a better chance joining the Union as a group rather than joining individually. He also explained that he was not the organizer but only the contact point between the group and Moore. Shortly after the break Israel spoke with Hatten, who was at the jobsite that day. Israel began "venting" his anger over the increase in the cost he had to pay for dental insurance. He told Hatten that the increase "really stinks" and that Troup was supposed to pay for all of it but now he was paying for it. Hatten called an employee in the office and told her to recalculate the cost of the dental insurance on a weekly basis rather than monthly so that Israel's cost would be spread out. Israel asked what was going to happen to his medical costs and Hatten answered that most likely the costs would increase in January and Israel would have to pay the increase. Israel said that "stunk" because Troup was supposed to pay for it. Israel said that he did not want to pay those costs and he would not pay it.

The next day, November 4, Hatten arrived at the jobsite after breaktime. He and Israel spoke about the status of the work on the site in a friendly, routine manner. Hatten later left the site. Around lunchtime Israel received a telephone call from Browning, the employee Israel had talked with over the weekend. Browning said he did not want to be part of the union organizing effort. He explained that there were "too many guys with big mouths" and he was afraid that Troup would find out and he would get fired.[4] After lunch Israel called the office to report that he had injured his finger and asked to talk with Hatten. The employee who answered the telephone said that Hatten was speaking with Troup, so Israel asked that Hatten call him back. About 15–20 minutes later Hatten did so. Unlike earlier in the day when they spoke, Hatten's tone was very somber. Hatten asked Israel, "What are you doing?" Israel described what work he was doing but Hatten said, "No, no, no, I want to know what you are doing. What the hell are you doing. I just got off the phone with John Troup, what are you doing?" Israel answered that he did not know what Hatten meant. Hatten asked Israel to come to the office. Israel asked whether he should take his personal tools out of the van he used; Hatten answered, "Maybe you should." After that conversation Israel asked the employees on the site whether they had spoken to Hatten about the union organizing effort and the employees assured him that they had not done so.

When Israel arrived in Hatten's office, Hatten was on the telephone. Hatten then hung up the telephone, stood up, extended his hand and told Israel to give him the cell phone and the keys to the van. Israel asked why and Hatten said that if he had any questions he should call Troup. Israel asked about the personal tools that he kept on the van and Hatten said Israel could remove those tools right then. Israel asked if Hatten could give him a ride home and Hatten said no, that it was not Hatten's problem. Hatten again told Israel to call Troup. Israel said he would not do so, that Troup should be "man" enough to call him and let him know what was going on. Israel then called an employee at the Voss Dental jobsite and explained that he thought he had just been fired and asked the employee to gather Israel's personal tools that were still at the site. Israel also called wife, Julie, and told her that he thought he had just been fired and asked her to come pick him up. Julie left her job and drove to the facility where she encountered her husband and Hatten. Israel was unloading his personal belongings from the van. Israel repeatedly pressed Hatten to explain why he had to give Hatten the keys to the van and the cell phone and what it was all about. Hatten always responded that Israel had to call Troup. On one occasion Israel asked if it was about the Union. At that point Hatten's facial expression changed and he said that he did not know anything about that and Israel had to call Troup. At another point Israel said that Hatten did not have to stand there and watch him. Hatten said that he knew that Israel

[2] Troup admitted that he did speak with Moore and told Moore he did want Moore to call the office or his employees.

[3] At several points in his testimony Israel stated that the employees were "enthusiastic" about joining the Union. Although I generally credit Israel's testimony as explained more fully below, I conclude that this portion of his testimony is exaggerated.

[4] This conversation was not received for the truth of the matter asserted by Browning but only for what he stated to Israel.

was no thief but that he had to stay there. Israel unloaded his tools and personals items such as photographs of his children from the van. Hatten assured Israel that any of Israel's personal belongings that were left behind would be given to Israel later. Israel commented that it might be a good time to have his hernia surgery and asked Hatten if there was going to be a problem with the surgery and Hatten answered that no, that there should be no problem with that. Israel asked about his vacation pay, pay for that day, and COBRA entitlement and again Hatten said that there would be no problem. Before they left Julie completed a worker's compensation injury report on the injury to Israel's finger. Israel asked Hatten for that form and Hatten got him the form. Israel asked Hatten for a copy of the completed form and they went into the facility to make a copy. Hatten asked an office employee to give Israel a COBRA application. Israel asked that employee to mail his final paycheck stub to his home. Israel said goodbye to that employee and another employee who was there at the time. He shook hands with Hatten and said it was nice working with him and left.

The next morning Israel called Hatten and said that he thought he had left some tools on the van. Israel asked again what was going on and why was he let go and Hatten again replied that Israel should call Troup. Israel said that he was very disappointed in Hatten for not "sticking up" for him. Hatten responded that he was disappointed at what he had heard. Israel asked what had Hatten heard, but Hatten replied that Israel should call Troup. That same morning, as directed the evening before by Hatten, Browning appeared at the Voss Dental jobsite. That morning Hatten came to the jobsite and spoke with Browning. Browning asked where Israel was, and Hatten replied that Israel was no longer "with us." Browning asked what happened and Hatten said it was a mutual agreement. Hatten told Browning that he was to take over Israel's job on the project. Hatten also spoke to Sam Speciale, who is related to Israel by marriage, at the Voss Dental jobsite that day. Hatten asked Speciale if Speciale had a problem with Israel not being on the jobsite. Speciale said no and asked if Hatten had a problem with him. Hatten answered no, unless Speciale makes a problem. Speciale said that then they did not have a problem.

Moore and Israel met on November 6 at the union hall. During the course of that meeting Israel called Troup at his Florida number. Israel left a message identifying himself and asking that Troup call him back. Troup did not return the call.

The next day Israel again called Hatten. Israel mentioned that he had called Troup the day before, but Troup had not yet returned his call. Hatten said that Israel should not worry, that Troup would return his call. The next week Hatten and Israel met at a coffee shop where Hatten returned some tools to Israel. They drank coffee and made small talk. On Saturday, November 15, Israel called Hatten and asked why he did not get paid for November 3 and 4. Hatten said that he did not know that Israel had not been paid for those days. Hatten said that he could not deal with it anymore, that he had called Troup and that Troup would call Israel. That afternoon Troup called Israel. Troup said that he forbad Israel from calling the office or talking to any employees. Troup said that if there was anything Israel wanted, he should put it in writing and send it to Florida. Israel explained that he had just called about his pay and asked what was going on. Troup answered, "You know what it's about." Israel asked if it was about the Union, and Troup repeated his previous reply. Troup indicated that he was not interested in hearing any of Israel's explanations. Later that month Israel was in the hospital preparing for his surgery and the hospital wanted his insurance carrier's name, policy number, and address. Israel called Respondent's office and asked the office employee for the information. The employee said that Troup was there and asked if Israel would like to talk to him. Israel said not really but the next thing Troup was on the telephone. Israel explained why he had called and Troup replied that they did not run around for Israel in the office any more. Israel explained that he was in the hospital and needed the information. Troup gave Israel the name of the insurance carrier, but when Israel asked for the policy number Troup told Israel to find it himself.

III. CREDIBILITY RESOLUTIONS

Except as specifically indicated otherwise, the foregoing facts are based on the credible testimony of Israel, Julie Israel, Sam Speciale, and Moore. I recognize that I had to remind Israel on several occasions to separate his subjective impressions from what had occurred or was said during conversations, but I am convinced he was able to do so after being reminded. I also recognize that Israel was combative on cross-examination, but I conclude this was largely due to the repeatedly argumentative nature of the questioning. Israel testified in detail concerning the events and conversations and his demeanor impressed me as credible. Importantly, his testimony was internally consistent. Portions of his testimony were also corroborated by Moore, Speciale, and Julie Israel. Respondent, in its brief, challenges Israel's credibility by pointing to 13 alleged contradictions in his testimony. Many of the alleged contradictions cited by Respondent merely recited testimonial differences between Israel and Hatten and thus are not internal contradictions within Israel's testimony. The remaining matters cited by Respondent as contradictions made by Israel simply do not amount to contradictions at all. For example, Respondent cites the testimony by Israel that the employees were concerned about whether they would continue to have jobs with Respondent yet they contacted the Union in the belief that the Union could somehow make their jobs more secure. I find no contradiction in this testimony; employees may believe, rightly or wrongly, that a union may assist them in matters of job security.

I have credited Browning's testimony concerning what he was told by Hatten on November 3 and 4. But I do not credit his testimony that when Israel called him over the weekend before November 4, he told Israel that he did not want to participate in the Union effort. Browning appeared to be testifying in a manner that was more concerned with not offending his employer or risking his job than accurately conveying the facts.

I have considered Troup's testimony and have determined not to credit it except to the extent that it may corroborate the facts set forth above. Troup testified that there were several reasons why he told Hatten to have Israel turn in the cell phone and the keys to the van. One was the matter of a punch list of work not yet completed for the Science Museum project.

Troup testified that sometime in October, Israel called him and told him that Science Museum job had been completed and inspected and that everything was fine. Israel had worked as the general foreman on that job. Another reason was the matter of cell phone usage. Troup testified that he talked with Israel about the "constant over-usage of the [cell] phone." Troup testified that midday on November 4 Hatten called him and said that Israel was demanding a $2-per-hour pay raise the following June and that Israel did not want to have to pay for his medical and dental benefits and if he did have to pay for them he was considering giving Hatten his 2-weeks' notice. Hatten also said that he had received a "pretty heavy" punch list on the Science Museum job. Troup then instructed Hatten to have Israel bring the van to the facility, turn in the cell phone and the keys to the van, and to tell Israel to call him. Troup testified that he wanted to discuss these matters with Israel. Troup explained that he wanted Israel to return the cell phone because of over usage and he wanted the van returned because he did not know if Israel would be quitting and he did not want things missing. Troup admitted he continued to consider Israel to be a valued employee at this point. Later that day, Hatten and Troup again spoke and Hatten reported that Israel had refused to call him. About 2 weeks later, after Hatten had complained that Israel had been constantly calling him, Troup called Israel and told him to stop calling Hatten or the office and that if he had any matters he wanted to raise he should do so in writing. Troup testified that Respondent considered that Israel had quit when he did not show up for work for 3 days. In a report filed with the New York State Department of Labor concerning Israel's claim for unemployment compensation benefits, Troup asserted that Israel quit when he did not appear for work "nor did he call as to why he did not show up for work." This statement is plainly at odds with Hatten's admission that Israel did call for several days after November 4 and Troups' own admission that Hatten had complained to him that Israel had been calling Hatten every day following November 4. Troup testified, if Israel had called him he likely would have returned that cell phone and van to Israel.

I have also considered Hatten's testimony and here too I do not credit this testimony except to the extent it corroborates the facts described above. Hatten testified that, as requested by Troup, sometime in September or October he asked Israel to explain why the cell phone bill went up dramatically. Hatten testified that he asked Israel to examine the bills but Israel refused to do so and then the next day or so he reported Israel's refusal to Troup. However, Hatten's testimony was often in response to leading questions and I am uncertain whether Hatten relayed the entire conversation with Israel or only selected portions. Hatten testified that Israel brought up the subject of his pay and benefits about once a month but Hatten could not recall any specific conversation. Hatten "did not recall" being on the Voss Dental job on November 3 but claimed that on November 4 Israel complained that the cost of his dental insurance had increased. According to Hatten, he explained to Israel that Respondent did not pay for dental insurance but Israel protested that he had a deal with Troup and he should not be paying for dental insurance. After Israel showed him how much had been deducted from his paycheck, Hatten called the office because it was apparent that the amount had not been correctly calculated. Israel then asked what would happen if the cost of medical insurance went up, and Hatten answered that Respondent was planning to pass the increase costs on to the employees. According to Hatten, Israel said that if that happened Hatten should consider Israel giving Hatten his notice. Hatten asked whether Israel was jumping the gun because any increase would not happen until January if it happened at all and Israel replied that if the increase was passed on to him in January, he would give his 2 weeks' notice and would no longer work there. Israel added, according to Hatten, that next June he wanted a $2-per-hour raise and that matter was not negotiable. The conversation then turned to the work at hand. Hatten specifically denied that Israel raised the subject of the Union during that conversation. Hatten continued, explaining that he returned to the office and discovered a punch list of work that needed to be done to complete the Science Museum project. Hatten claimed that he did not want to have to continue to deal with Israel's complaints and called Troup and informed him of the days' events as they related to Israel. According to Hatten, Troup replied between the matters he reported, and Israel's cell phone usage, "and the van," he wanted to talk to Israel. Troup instructed Hatten to have Israel turn in the keys to the van and cell phone and tell Israel to call him immediately. Hatten admitted that Israel could not perform his duties as a general foreman without the van. Later, after Israel had come to the office and turned in the keys and cell phone, Hatten testified that Israel "asked if he should take—If he could take his stuff out of the truck and I said, yeah." Hatten denied that he told or suggested to Israel to empty the van. Hatten did admit that he told Israel that he knew that Israel was not a thief but that he had to watch Israel unload the van anyway. Hatten denied that Israel raised the subject of the Union. Hatten testified that after Israel left that day he was hoping that Israel would return to work, but Hatten did not explain how this would happen given the fact that Israel could not realistically perform his work unless the van and the cell phone were returned to him. After Respondent initially completed its direct examination of Hatten and after a lunchbreak, I granted Respondent's request to ask Hatten additional questions. At that point Hatten testified that while Israel was emptying his van that day Israel said that as long as he got his 2 weeks' vacation pay they should consider this "just a friendly parting of the ways." Yet in the two pretrial affidavits that Hatten gave to the Board, he made no mention of such comments by Israel. Hatten also testified that the first he learned that Israel was contending that he was terminated because of his union activities was when he received the charge in this case. He testified that before that, no employee ever told him that there were union activities going on.

As can be seen from the recitation of the testimony of Troup and Hatten, between the two of them they gave four reasons why they decided to have Israel turn in the keys to the van and the cell phone. One reason, according to Hatten, was Troup's concern about "the van." Hatten explained that about 6 months earlier Troup had been concerned that employees were using the vans for personal side jobs as reflected in the amount of gasoline charged on the credit card. Hatten commented that

while he did not have such a problem with Israel's van usage, he passed on Troup's concern to Israel and told him that he was not to use the van for side jobs. Hatten further admitted that he had no reason to believe that Israel disobeyed that directive and that he considered the matter resolved months before the events of November 4. Hatten further admitted that there was no documentation in Israel's personnel file relating to his alleged abuse in using the van Respondent provided to him even though Respondent's handbook sets forth a policy for placing letters in employee personnel files when they commit acts considered by Respondent to be egregious. Under these circumstances I conclude that Troup's alleged concern about "the van" was retrieved from the storage bin in an effort to disguise another reason that would explain Respondent's conduct.

A second reason given was Israel's "constant over-usage of the [cell] phone." Yet Respondent received the last bill for cell phone shortly after October 10 and Troup did not explain why he waited until November 4 to act on this alleged problem. Nor did Respondent explain how the cell phone usage records introduced into evidence buttressed its position. That is, Respondent did not identify which calls it considered to be personal and I am unable to do so from my own examination of those records. And, as described above, it appears the problem had been resolved when Respondent again began accepting payments of $50 per month from Israel to cover the personal calls that he made. I conclude it was something other than the cell phone usage that prompted Troup into action on November 4.

A third reason was the punch list for the Science Museum project. But Hatten admitted that punch lists are common and there is no evidence that Respondent reacted negatively to them in the past. While Hatten testified that it was the content of Science Museum project punch list that concerned him, it is significant that he did not first ask Israel, his most competent employee, about the punch list. Rather, according to Hatten's testimony he first complained about it directly to Troup. Under these circumstances I conclude that the punch list matter was a convenient pretext used by Respondent to attempt to justify its treatment of Israel.

Finally, Hatten and Troup indicated that they relied on the fact that Israel was again complaining about his benefits and salary in that he wanted parity with the union scale. However, the record indicates that Israel had done this repeatedly during his employment with Respondent and had suffered no negative consequences. His most recent complaint to Hatten had occurred on November 3 and by the next day it seemed Hatten had moved on as he did not raise the matter with Israel when they talked on November 4. Neither Troup nor Hatten offered a credible explanation of why this time Israel's complaint could no longer be tolerated.[5]

[5] In its brief Respondent seeks to fill this gap by asserting that Hatten's health problems caused him to no longer be willing to bear the problems created by Israel. This argument is clearly created after-the-fact and only serves to further undermine Respondent's case.

IV. LEGAL ANALYSIS

The first issue I address is whether Israel quit or whether he was fired.[6] In doing so I apply the standard used by the Board and assess whether Respondent's words and conduct would lead a reasonably prudent employee to conclude that her employment had been terminated. *Kolka Tables*, 335 NLRB 844, 846–847 (2001). It is important to note at the outset that Respondent does *not* contend that Israel quit on November 4; rather it contends that it considered Israel to have quit when he did not appear for work for the 3 days following November 4. Here the evidence shows that Israel was called to the office and told to return Respondent's cell phone, the keys to Respondent's van, and to remove his personal tools and other items from the van. The record is clear that Israel could not perform his duties for Respondent without his personal tools, the phone, and the van. Moreover, Hatten and Israel discussed matters such as Israel's accrued vacation time, his pay for his last day of work, and how he would receive his final pay stub. It is abundantly clear that under these circumstances a prudent employee could reasonable believe he had been terminated. Hatten made matters worse when he failed to directly respond to Israel's inquiries as to why he was being fired by instructing Israel to call Troup. Yet when Israel did call Troup 2 days later and left a message, his call went unanswered. Finally, when Troup and Israel did speak on November 15, Troup's only explanation to Israel was that Israel knew what it was about. So if there was any ambiguity as to whether Israel had been fired, Respondent had opportunities to clarify the matter but it failed to do so.

Under these circumstances it follows that I must reject Respondent's contention that Israel quit when he did not appear for work on November 5–7. Israel was not expected to return to work on those days because he had been fired on November 4. When Israel called Troup on November 6—within the 3-day period—Troup failed to return the call.

I apply the legal analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983) and *Manno Electric*, 321 NLRB 278 (1996) to determine whether Israel was unlawfully discharged. The burden of proof rests with the General Counsel to establish the necessary elements to meet his initial burden. *Des Moines Register & Tribune*, 339 NLRB 1035, 1037 (2003). In this case I have concluded above that Israel engaged in union activity by soliciting his coworkers to support the Union and by contacting the Union to gain representation. There is no direct evidence that Respondent knew of these activities and only some evidence that it harbored animus against them, but these elements may be established by circumstantial evidence. *Vulcan Waterproofing Co.*, 327 NLRB 1100, 1109–1110 (1999). The Board has inferred unlawful motive where the employer's action is "baseless, unreasonable, or so contrived as to raise a

[6] At the hearing Respondent contended that it could establish that Israel committed perjury by working after November 4 and at the same time receiving unemployment compensation. Respondent does not renew this argument in its brief. In any event I conclude Respondent has failed to prove this contention.

presumption of unlawful motive." *Montgomery Ward*, 316 NLRB 1248, 1253 (1995). See also *ADS Electric Co.*, 339 NLRB 1020, 1023 (2003) and *Shattuck Denn Mining Corp., v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). Direct evidence of antiunion animus is not required; it can be inferred from circumstantial evidence based on the record as a whole. *Abbey's Transportation Services*, 284 NLRB 698, 701 (1987), enfd. 837 F.2d 575 (2d Cir. 1988). The same set of circumstances may establish both employer knowledge and unlawful motive. *NLRB v. Long Island Airport Limousine Service*, 468 F.2d 292 (2d Cir. 1972).

It should be recalled that in the late summer in 2000 Troup told Israel that the next time he heard anything about a union from any worker, the employee would be fired. Although this statement occurred over 3 years before Israel was fired it is nonetheless some direct evidence of unlawful union animus. More recently, in mid-October Troup called Moore and said that Moore was a "lousy piece of shit" and said that if Moore ever called the office again or talked to any of his people anytime or any place, he would come looking for Moore. This too is evidence of unlawful union animus.

In this case the timing of Israel's discharge strongly supports the finding that Respondent knew of Israel's union activities and Israel was discharged because of them. By Friday, October 31 Israel had lined up employee support for the Union, met with the employees as a group, and had contacted the Union. He continued those activities over the weekend and on the morning of November 3. Israel was fired the next day, November 4. The abruptness of the termination also supports the inference of an unlawful termination. Here, Israel was called midday to return to Respondent's facility where he was terminated midweek.

During the conversation where Hatten instructed Israel to come to the office on November 4, Hatten asked Israel "What are you doing?" Then Israel described what work he was doing but Hatten said "No, no, no, I want to know what you are doing. What the hell are you doing. I just got off the phone with John Troup, what are you doing?" The next day Hatten told Israel that he was disappointed at what he had heard about Israel. These remarks are evidence that Hatten had learned of some new concern about Israel from Troup and I infer under these circumstances that the new concern was Israel's union activities.

Finally, as described above I have rejected as pretexts the explanations given by Respondent as to why it decided to ask Israel to turn in the keys to the van and the cell phone. Under these circumstances I make the inference that the real reason was an unlawful one—that Israel had begun to organize the employees to join the Union.

Taking into account all these circumstances, I conclude that the General Counsel has met his initial burden under *Wright Line*. Turning to Respondent's case, it is important to note that Respondent does *not* contend that Israel was fired because he failed to follow Hatten's instructions to call Troup. Rather, Respondent's position is that Israel quit, a position that I have rejected above. It follows that Respondent has failed to meet its burden under *Wright Line*. *Teamsters Local 657 (Texia Productions, Inc.)* 342 NLRB No. 59, slip op. at 1 fn.1 (2004).

CONCLUSION OF LAW

By discharging Avi Israel because he engaged in union activity, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent having discriminatorily discharged Avi Israel, must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusion of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, J.S. Troup Electric, Inc., Blasdell, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting the International Brotherhood of Electrical Workers, Local 41 or any other union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Avi Israel full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Avi Israel whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the Decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Blasdell, New York, copies of the attached Notice marked "Appendix."[8] Copies of the Notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where Notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the Notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the Notice to all current employees and former employees employed by the Respondent at any time since November 4, 2003.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., November 3, 2004.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the International Brotherhood of Electrical Workers, Local 41 or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Avi Israel full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Avi Israel whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Avi Israel, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

J. S. TROUP ELECTRIC, INC.